

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

B
P/S

**Docket
No. 74-2516**

**IN THE
United States Court of Appeals
For the Second Circuit**

OLIN CONSTRUCTION COMPANY, INCORPORATED,

Petitioner.

—vs—

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and PETER J. BRENNAN, SEC-
RETARY OF LABOR.

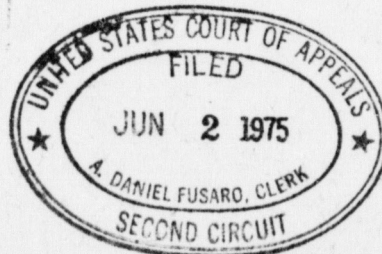
Respondents.

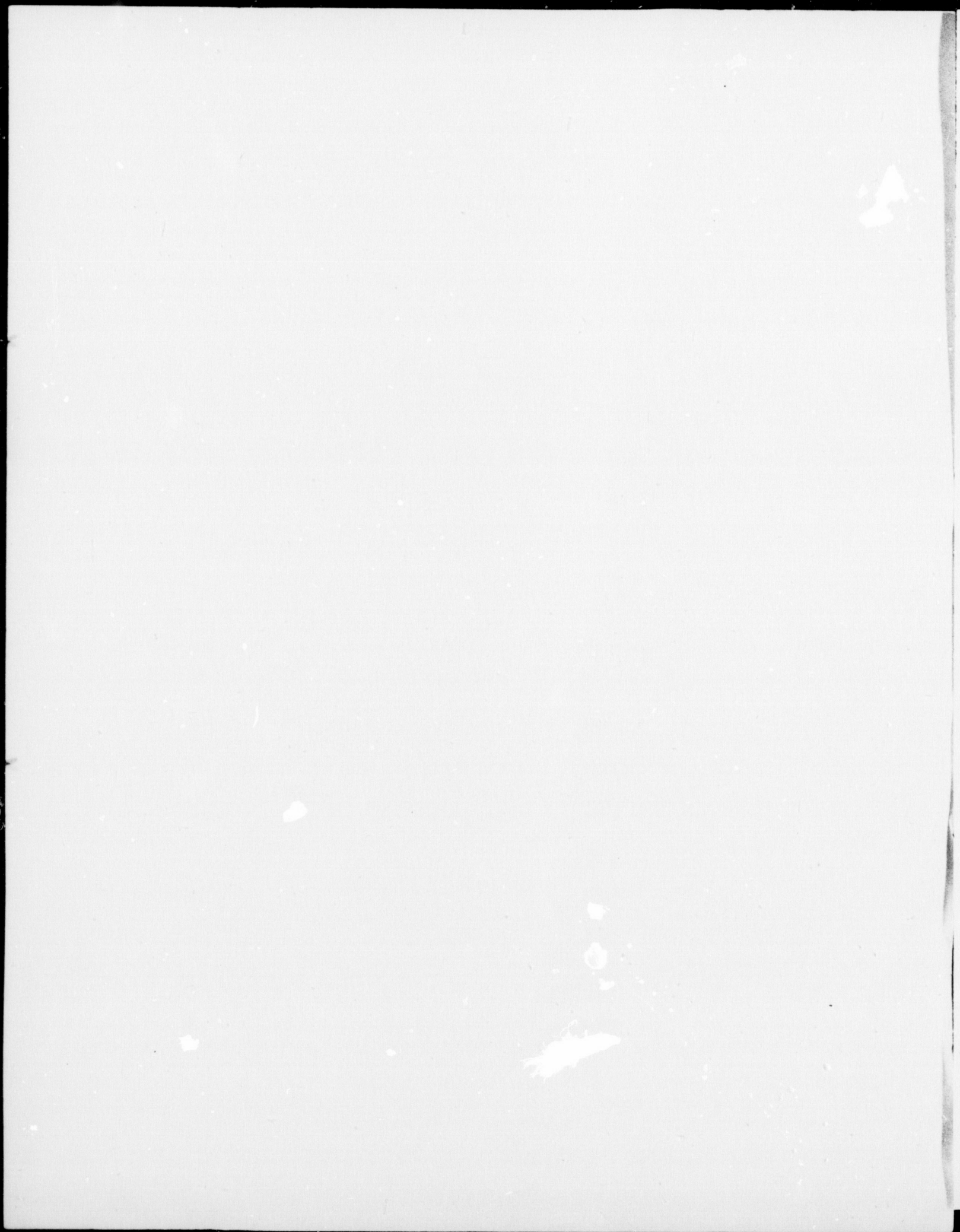
**REPLY BRIEF FOR PETITIONER,
Olin Construction Company, Incorporated**

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(7323)





**IN THE
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OLIN CONSTRUCTION COMPANY, INCORPORATED,

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-vs-

C. A. No. 74-2516

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and PETER J. BRENNAN,
SECRETARY OF LABOR,

Respondents.

**REPLY BRIEF FOR PETITIONER,
Olin Construction Company, Incorporated**

A reading of respondent's brief requires a written reponse to offset the unwarranted assumptions, innuendos, characterizations and conclusions contained in respondent's brief.

Unchallenged, petitioner believes that the Court could be misled into believing that what are stated to be facts and conclusions are without foundation in the record.

Suspicious activity of petitioner's employees

On page 2 of its brief, respondent states that the Commission found as a fact that "the inspectors.....saw a worker hurriedly (emphasis ours) emerging from the trench by a ladder placed in one end..."

By this characterization, respondent in its brief, seeks to create an aura of suspicion in implying that respondent's employees knew they were engaged in wrongdoing. In fact, respondent urges this very conclusion on page 11 of its brief.

Petitioner submits that a search of the record will show that the witness Whiteside, the Administrative Judge and the Commission did not characterize the action of the worker in any manner.

Working in trench -vs- installing bracing

Respondent in an effort to overcome the Commission's own determination that presence of employees in a trench for the purpose of installing shoring was not a violation of the standard (p. 12 of petitioner's brief) seeks to have this Court believe that the Administrative Judge by finding that employees were working in the trench meant that the employees were doing work other than installing bracing and expressly rejected petitioner's claim that "company employees were installing bracing when the inspectors arrived." (p. 6, respondent's brief).

Respondent's argument starts with the assertion on page 3 of its brief that the Commission found as a fact that:

... "At the trench bottom opposite this attempted bracing the inspectors also observed "shovels, crowbars, some material***used to join***pipes together" and other implements, indicating that work had recently been done there...." (emphasis ours).

Perforce its contention that the presence of tools in the trench meant that work (other than installing bracing) was being done in the trench, respondent then in its argument (p. 8, respondent's brief) defines the work being done, as follows:

... "On this record, the judge's conclusion that Olin committed a serious safety violation by permitting its employees to lay pipe....."

The difficulty with this position and assumption is that the Administrative Judge never made a finding or conclusion that Olin employees were laying pipe in the trench, no witnesses testified that Olin employees were laying pipe and the photographs, Exhibits 4, 5 and 6, do not show any such activity. If, in fact, the Administrative Judge had made such a finding, the record would not support such a conclusion.

The fallacy of respondent's argument is the assumption that the presence of tools and equipment in the trench meant that Olin employees were using them at or prior to the time of inspection.

The Commission itself has rejected such an assumption for in the case of Secretary of Labor v. W. R. Lesoing Mechanical Contractor, OSAHRC Docket No. 3979, April 4, 1974, 1 OSHC 3357, five shovels were observed upright in the bottom of the trench. The Commission held that the Secretary failed to meet its burden of proof that the workers were in the trench for reasons other than bringing the trench into compliance with the standards.

Further, respondent apparently overlooks the fact that the ultimate burden of proof was on the Secretary to show that the presence of employees in the trench was for purposes other than installing shoring (Secretary of Labor v. W. R. Lesoing Mechanical Contractor, supra). This burden requires more than the resolution of a conflict of testimony between witnesses but must be affirmatively supported by a preponderance of the evidence (Secretary of Labor v. W. R. Lesoing Mechanical Contractor, supra).

The "harmless error" assumption as to the burden of proof.

Respondent evidently does not disagree that the determination of the Administrative Judge was in error because it is based on substantial evidence rather than a preponderance test (note 9, p. 14, respondent's brief).

Respondent contends, however, that the Commission must have determined such oversight to be "harmless error" because the Commission allowed the Administrative Judge's order to become final without review.

Respondent requests this Court to make any assumption upon a purely discretionary negative act of the Commission. Review of an Administrative Judge's decision and order is discretionary with the Commission (29 C.F.R. Sec. 2200.91). Being discretionary, petitioner submits the Commission does not have to review the determination of the Administrative Judge even if the Commission believes the decision and order to be erroneous.

Petitioner submits that no inference can be drawn from the Commission's failure to direct a review.

Respondent further urges that the "dispositive credibility resolutions" would have been the same under either test.

Petitioner respectfully suggests that even if the testimony of the Secretary's witnesses be determined to be more credible than the testimony of Olin witnesses, the testimony of the Secretary's witnesses in the case at bar was not sufficient to support the Administrative Judge's decision by a preponderance of the evidence as the violation can be determined only upon inferences from the Secretary's witnesses and not direct testimony itself.

Other unwarranted assumptions and conclusions.

Page 3 of the respondent's brief - statement that Olin foreman stated that employees were working at the trench bottom - is not supported by any testimony.

Page 3 respondent's brief - Whiteside did not ask employees what they were doing in trench (App. 100).

Footnote 3, page 4 and continued - the August 7th violations referred to in last paragraph of footnote were dismissed by Judge Oringer.

Page 8 of respondent's brief - there is no testimony that tools were actually being used. Whiteside did not know (App. 100). Murphy had not been at the worksite before the inspection (App. 119). Duerr stated that only work being done was installing of shoring (App. 151).

Page 10 of respondent's brief - respondent asserts that a violation occurred because the trench had been open for over an hour before inspector's arrived "and Olin took no steps to limit its workers access to this hazard" (emphasis ours). This statement is pure speculation, unsupported by any testimony and contrary to the physical evidence shown in photographic exhibits 4, 5 and 6.

Pages 11 and 12 - respondent's brief - respondent seeks to discredit testimony of foreman Duerr. It should be remembered that there is a sharp conflict of testimony as to what question Duerr was asked by the enforcement officers. Duerr testified that he was asked "who were the men who worked in the hole" (App. 151). Not who where the men working in the trench as stated by Whiteside (App. 91).

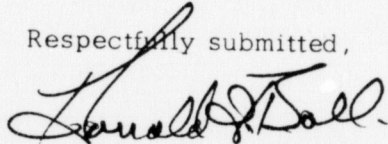
It is suggested that respondent's argument cannot be sustained as respondent's proof is not clear and convincing. Duerr admitted that he had men in the trench installing shoring and would so advise Superintendent Murphy. But respondent offers no physical proof that there were men in the trench doing anything else. In fact, the only physical proof as shown on the photograph exhibits 4, 5, and 6 clearly shows no other work was being done.

Certainly Duerr did not have to point out to the enforcement officers that shoring was being installed. The photographs clearly show the shoring for both portions of the trench (App. 153, 154).

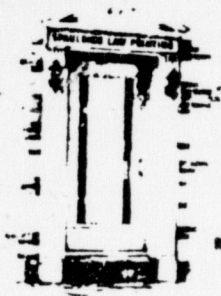
Petitioner submits that Duerr's testimony is completely

consistent with the physical evidence submitted by the Secretary and that in fact the only activity that had taken place at the time of and prior to the inspection was the installation of shoring.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Leonard J. Bell".

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Date: May 30, 1975

HON. A. DANIEL FUSARO, Clerk
U. S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, N. Y. 10007

Re: Olin Construction Co. vs. Occupational Safety and Health Review, etc.

Index No. ---

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

~~XXXXXX~~ [25] Reply Briefs

~~XXXXXX~~

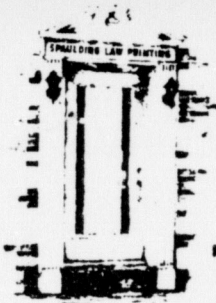
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Very truly yours,

Everett J. Rea
Everett J. Rea

cc: Donald J. Ball, Esq.



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RE: Olin Construction Co., Inc. vs. Occupational Safety and
Health Review Commission and Peter J. Brennan, Secretary of Labor

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

Everett J. Rea , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse,
New York, and is over twenty-one years of age.

That at the request of Donald J. Ball, Attorney for Petitioner,
Reply

(x)he personally served three (3) copies of the printed ~~[Record]~~ [Brief]
~~[Appendix]~~ of the above-entitled case addressed to:

MICHAEL H. LEVIN, ESQ.
Counsel for Appellate Division
U.S. Dept. of Labor
Office of the Solicitor
Room 5335
Washington, D. C. 20210

by depositing true copies of the same securely wrapped in a postpaid wrapper
in a Post Office maintained by the United States Government in the City of
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Everett J. Rea
.....

Sworn to before me this 30th
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Ruth S. Moloney
Commissioner of Deeds

cc: Donald J. Ball, Esq.